

THE STATE OF NEW HAMPSHIRE

COÖS, SS.

SUPERIOR COURT

No: 04-E-145

State of New Hampshire Department of Environmental Services

vs.

Joseph Marino and Rose Marino

ORDER ON THE MERITS

A bench trial was held in the above captioned matter on August 24 and August 25, 2006. The Court viewed the property prior to the commencement of testimony. The Court previously entered orders granting the State's motion for partial summary judgment and denying respondent's cross motion for partial summary judgment (index #126). In its order, the Court found in favor of the State of New Hampshire Department of Environmental Services (hereinafter DES), ruling that the respondents, Joseph and Rose Marino (hereinafter Marinos), had 1) violated the provisions of the Comprehensive Shoreland Protection Act, RSA 483-B ("CSPA") and 2) violated the provisions of the Water Pollution and Waste Disposal Act, RSA 485-A ("Water Pollution Act"). The Court found a genuine issue and material fact existed as to whether the Marinos had violated the provisions of the Fill and Dredge in Wetlands Act, RSA 482-A ("Wetlands Act").

Accordingly, the remaining issue for trial was whether the Marinos had violated the provisions of the Wetlands Act and what sanctions the Court should impose with respect to the violations pervious found of the CSPA, the Water Pollution Act and, if applicable, the Wetlands Act. For the reasons setforth below, the Court finds that the respondents have violated the

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provisions of the Wetlands Act. Further, the Court orders that the respondents are subject to the imposition of penalties and fines, as more fully setout herein.

The Court finds the following facts relevant for purposes of this order.

The property in question is owned by the Marinos and located on 68 Spooner Road in Pittsburg, New Hampshire ("the property"). The Marinos acquired this property in 1991 by deed from Mrs. Marino's brother. Initially, the Marinos intended to place a travel trailer on the property. Mrs. Marino's brother graded a small level area for that purpose. The property is approximately .13 acres and contains 150 feet of frontage along Back Lake in Pittsburg, New Hampshire.

After living in Florida for a number of years following their retirement, Mrs. Marino testified that the hot summers were too uncomfortable. Since the couple owned the property in Pittsburg, New Hampshire, they decided to spend the summers in northern New Hampshire. There is no dispute that the Marinos began construction of a home on the property on or about October 14, 2004. The home was to be a single-family retirement home, measuring approximately 26 feet by 50 feet. The Marinos contracted with Jules Rancourt, a local builder, to build the home. The original contract price \$122,000.00.

Mr. Rancourt testified that he did not do any of the earth moving work in preparation for the foundation to be poured, nor did he participate in the foundation portion of the project. The Marinos hired another local contractor, Lawrence Blakely, to do the excavating work, which included digging the hole for the foundation and back filling around the foundation. The Court was not provided with any direct evidence as to what happened with the material withdrawn from the ground to construct the foundation. The Court was also not provided with any

evidence that any additional fill had been trucked onto the property. The Court did view the property, noting the general topography of the property and adjacent properties. The Court examined photographs of the property taken by employees of DES on November 23, 2004. These photographs show substantial amounts of material that appeared to have been bulldozed and leveled from the back wall of the foundation up to the bank of Back Lake. The photographs depict what the Court finds to be newly moved material (exhibits 17.1, 17.3, 17.5, 17.6, and 17.10).

On November 1, 2004, the Marinos contracted with Capital Well to install a drilled well on their property. Steven Voisine, an employee of Capital Well, testified that the well drilling occurred on or about November 2, 2004. The work included the installation of an overflow adapter on the well (exhibits 21 and 22). A trench, approximately 2 feet wide and 4 feet deep, was dug from the location of the wellhead to Back Lake. A pipe was installed for the overflow from the well (see exhibit 17.3). Included in the Capital Well contract was the installation of the holding tank in the basement of the Marino home, as well as all connecting valves and pipes. No water was connected to the house from the well.

Jules Rancourt testified that he completed construction of the Marino home sometime in early April of 2005. The Court observed during its view of the property that the Marino home is fully complete with all piping, plumbing, a multi-zone heating system, water systems, electrical systems, appliances, furnishings, bathroom fixtures, toilets, sinks, bathtubs and related accoutrements. But for the lack of water into the property, the property would be a fully functioning single-family home. Prior to Jules Rancourts agreement to construct the Marinos home, he was advised by the Marinos that they had obtained all applicable permits, including

the local building permit.

Joseph Marino is a retired lawyer and former Superior Court Clerk in the State of Massachusetts. Joseph Marino testified that he was familiar with the provisions of the CSPA prior to the construction of the home on the property. Mr. Marino testified that in his opinion, the provisions of the CSPA, specifically, RSA 483-B10, permitted him to construct the home that is presently on the property without any State permit requirements. He acknowledged during his testimony that the CSPA references other statutory provisions, including the provisions of RSA 485-A pertaining to septic laws, and RSA 482-A pertaining to dredge and fill for public waters.

The DES received an anonymous phone call sometime in late October of 2004, alerting them to the construction on the property. Allyson Gourley, an employee of DES, phoned Mr. Marino on October 29, 2004. She advised him that he was in possible violation of the CSPA. She explained that construction within 50 feet from the shoreline, without approval from DES, would constitute a violation of the Shoreland Act. During the course of this telephone conversation, Ms. Gourley also advised Mr. Marino that she was unable to find any record of a septic system application or approval being submitted by the Marinos in connection with construction on the property. Ms. Gourley advised the Marinos they should cease construction until these issues were resolved.

William Evans, the administrator of the Department of Environmental Services Subsurface Systems Bureau, was alerted to the Marino issue on the same day. Mr. Evans also contacted Mr. Marino by telephone, after confirming that there was no septic approval on file with the State. He advised Mr. Marino that he should cease construction until the issue

could be resolved.

DES sent a letter to the Marinos on October 29, 2004, detailing the issues that had come to the Department's attention and advising the Marinos to cease work on the project immediately. On October 30, 2004, Mr. Marino responded to the DES by letter, denying any violations of state law and directing the DES not to contact his contractors.

On November 2, 2004, DES representatives, including Collis Adams, the Wetlands Bureau Administrator for DES; William Evans; and Allyson Gourley, met with the Marinos at the DES office in Concord, New Hampshire. The Marinos were again advised to stop work on the property until all permitting issues could be resolved. During the meeting, William Evans discussed with the Marinos the need for, and the requirements of, a septic system design and approval and Collis Adams discussed and advised the Marinos with respect to the provisions of the CSPA. The Marinos, in response to the information provided by the DES representatives, asserted that he had a right to build a home on the property and that any restriction on the size and location of the home was contrary to their statutory property rights. The minutes of the November 2, 2004, meeting (respondent's exhibit D) summarize in detail the State's position and the Marino's position, as expressed at the meeting.

On November 8, 2004, the DES sent a follow-up letter to the Marinos, again advising them that a State approved septic design must be obtained prior to water being installed on the structure and that the location of the new house, which at the time was partially constructed, did not meet the set back requirements of the CSPA (respondent's exhibit E).

The Marinos, fully advised of the potential implications for further construction, and while they were exchanging correspondence and discussions with the State, contracted for the

installation of a complete deep-water well system and all hook ups. On November 8 and again on November 14, 2004, Mr. Marino contacted Karen Dickson of North Country Septic Design to inquire about the installation of a holding tank on the property (exhibits 9 and 10). Ms. Dickson responded by letter dated November 15, 2004, advising Mr. Marino in no uncertain terms that a holding tank could not be installed on the property (exhibit 11). Undaunted, Mr. Marino faxed a letter dated November 16, 2004, to Ms. Dickson asserting his right to install a holding tank (exhibit 12).

After being notified by the State, via telephone calls, personal visits and letter that there were serious issues confronting the continued construction of their home, Mr. Marino directed his builder, Mr. Rancourt, to continue construction of the home. After being served on January 8, 2005, with the State's petition and request for injunctive relief, Mr. Marino, on January 18, 2005, wrote to Mr. Rancourt asking him to rush the project to completion.

DISCUSSION

The Court addresses whether the Marinos violated RSA 482-A by installing an overflow drain and by landscaping the property without obtaining a dredge and fill permit from DES. There is no dispute that an overflow pipe runs from the Marino's wellhead to the shore of Back Lake. There is also no dispute that the overflow pipe is buried in the ground approximately 4 feet deep in a trench that was approximately 2 feet wide when dug. The overflow pipe extends out over the bank to the edge of the water of Back Lake and has a continual flow of water from the well running into Back Lake.

The respondents argue that they did not violate the provisions of RSA 482-A:3 (1) because they did not excavate and remove fill, dredge or construct any structure in or on the

bank of Back Lake; and (2) their contractors, agents or employees did not excavate, fill, dredge or construct any structure in or on the bank during the construction of the house and for the installation of the overflow pipe from their well. The evidence supports a contrary conclusion.

Sometime prior to November 23, 2004, an agent for the defendant, Larry Blakely, excavated material for a foundation on the Marino property. In addition, Larry Blakely dug a trench into which a pipe was placed for the overflow for the well. Larry Blakely also back filled the foundation walls sometime prior to January 3, 2005 (exhibit L). The evidence supports a finding that the excavated material on the respondent's property, after the construction of the foundation, was leveled off along the balance of the property between the building and the bank of Back Lake (exhibit 17.1). When DES inspected the property on November 23, 2004, Allyson Gourley, the DES representative, observed the fill on the bank of Back Lake. Ms. Gourley testified that the material immediately adjacent to the residence was the same material as was located on Back Lake. The evidence also supports a finding that this material was recently placed in the location discovered by DES, because it contained no indication of build up of residual organic material, including pine needles, leaves or other miscellaneous material, which otherwise would be found in a natural state in an area such as the bank of Back Lake. Having examined the property, reviewed the exhibits in the case and listened to the testimony of the DES representative, the Court finds and rules that the material shown in exhibit 17.1 was, at the time of the pictures (November 23, 2004), recently placed on and in near the bank of Back Lake.

It is undisputed that a trench was dug and refilled for the overflow pipe running from the artisan well to Back Lake. The Court noted the location of the pipe on the view and the pipe is

clearly shown in the State's various photographs of the property. The evidence is also undisputed that the Marinos did not at any time apply for, or receive, a dredge and fill permit from DES. The evidence also supports a finding that after being notified of the need for a dredge and fill permit, the Marinos arranged for a contractor to do extensive landscaping from the rear of the building to the shore of Back Lake. The Court noted this landscaping at the time of the view. There was no evidence introduced that the Marinos ever applied for, or obtained, a permit to conduct the work evidenced by exhibit M.

Accordingly, the Court finds and rules that the evidence supports a finding that the Marino's did violate the provisions of RSA 482-A:3: and RSA 482-A:12.

REMEDIES

The Marinos are in violation the provisions of RSA 485-A *et seq.* and RSA 483-B *et seq.* and RSA 482-A. *et seq.* (see above). In reviewing the remedies available to the State and the imposition of sanctions against the respondent, the Court is mindful of the respondents' conduct throughout this case. Mr. Marino testified that he has been an attorney for over fifty years. He is or was a member of the Massachusetts Bar. His conduct, from the moment he became aware of the issues, shows a callous disregard for the rule of law. Mr. Marino, in the face of very clear and specific discussions with representatives from the Department of Environmental Services, continued to act contrary to the provisions of the applicable statutes. The Court finds that Mr. Marino's conduct, in connection the actions resulting in the violations that the Court has found, were unreasonable and deliberate. The evidence is replete with examples of this deliberate conduct. The State initially contacted Mr. Marino by phone on October 28 2004, followed by a letter on October 29, 2004, followed by

a meeting on November 4, 2004, and followed by another letter on November 8, 2004. The fact that issues had been raised with respect to the application of the statutes involved in this case should have been abundantly clear to Mr. Marino. The Court finds that Mr. Marino acted with the purpose and intent to disregard those statutes as demonstrated by his directing his contractors and others to continue to act contrary to the provisions of law. He testified that he was not obligated to stop work on his project because the State had not secured a cease and desist order. He was relying upon his interpretation of the various statutes as authority to continue construction. It is interesting for the Court to note that during this initial period, and up through the time when litigation was filed, there was no testimony that Mr. Marino either sought advise from New Hampshire counsel, did any research or completed other due diligence to determine whether his position was in fact supportable. The Court finds the conduct incredulous, considering his background, training and experience in the law. The Court finds that the conduct of Mr. Marino throughout the course of this dispute, beginning on October 29, 2004, and continuing through the date of the State's petition for injunctive relief and thereafter while Mr. Marino acted as his own attorney, represents a knowing, purposeful and willing violation of each of the statutes to which the State seeks sanctions. Mr. Marino, in a letter dated July 18, 2005, lends his own support for the Court's conclusion when he writes "...[w]e realize that we were a major contributor to the problem..." (Ex. 15). He asserts in the same letter that his contributions were not intentional. The Court disagrees.

I. Penalties for Violation of RSA 482-A

As the result of the violations of RSA 482-A *et seq.*, the respondents shall be subject

to penalties, as set forth in RSA 482-A:14 III and 482-A:14-(b) I, as follows:

1. A civil penalty in the amount of \$10,000.00 for failing to obtain a permit to place fill on the banks of Back Lake and install an overflow pipe from their well.
2. The respondents shall apply for after-the-fact authorization from the DES for any alterations made to the banks of Back Lake including grading, the placement of fill and the placement of an overflow drain. Any authorization not received from DES shall result in the removal and restoration of the effected areas.
3. The respondents shall not further alter the banks of Back Lake without DES authorization.

II. Penalties For Violation of RSA 483-B

As a result of the violations of RSA 483-B *et seq.*, the respondents shall be subject to the following penalties:

1. Civil penalties shall be imposed on the respondents beginning October 15, 2004, in the amount of \$1,000.00 per day for each day of the violations, not to exceed \$50,000.00.
2. In addition, in order to achieve the effect of RSA 483-B, the respondents must:
 - (a) within 90 days of the date of this order, obtain approval from DES for a septic system that complies with the State septic system law; and
 - (b) Within thirty days of the date of this order, respondents shall submit to a review by DES as to the appropriate size of the structure to be located on the property in order to comply with a structure the provisions of the CSPA.

If the respondents fail to obtain approval for the septic system within 90 days from the date of this order, the respondents shall remove the existing structure from the property, in its entirety, including basement and foundation walls. Removal required to comply with the provisions of sub paragraph (a) above or subparagraph (b) shall include the relevant portions of basement and foundations so that the disturbed area is returned to a permeable surface.

III. Penalties For Violations of RSA 485-A (Water Pollution and Waste Disposal Act)

As a result of the violation of RSA 485-A *et seq.*, the respondents shall be subject to the following penalties:

1. (A) Pursuant to RSA 485-A:44 I (2001), the respondents are enjoined from taking any action in violation of this provision of the law.

- (B) The respondents shall obtain, within 90 days from the date of this order, approval from DES for a septic system that complies with State law consistent with the provisions set forth above.

2. If the respondents fail to obtain the approval for septic system, as set forth herein, then as previously ordered, the building on the property shall be removed in its entirety, including the basement and foundation.


3. The respondents are fined \$5,000.00 pursuant to provisions of RSA 485-A:43 for their failure to obtain prior approval to construct a building for which waste will discharge.

This opinion constitutes the Court's findings of facts and conclusions of law. See RSA 491:15. Any of the party's requests for findings and rulings not granted herein, either

expressly or by necessary implication, are hereby denied and or determined to be unnecessary for the resolution in light of the Court's decision.

SO ORDERED.

September 11, 2006



Timothy J. Vaughan
Presiding Justice